IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Appeal No.1756-SB of 2007

Date of Decision: November 14, 2007

Sunil Kumar alias Bholu

...Appellant

VERSUS

State of Haryana

...Respondent

CORAM: HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.N.K.Sanghi, Advocate,
for the appellant.

Mr.Yashwinder Singh, AAG, Haryana,
for the State.

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RANJIT SINGH, J.

Sole appellant Sunil Kumar alias Bholu has filed this appeal impugning his conviction under Sections 363, 366-A and 376 IPC mainly on the ground that the trial court wrongly came to the conclusion about the age of the victim to be less than 16-17 years, whereas the evidence would clearly show her to be more than that age. Another ground in support of the appeal is that this was case of consent, rather than any forcible abduction or sexual intercourse as held. In support of his pleas, the appellant would mainly rely upon the

evidence given by the victim, which, according to him, fully supports his case. The victim is not the complainant as the appellant was prosecuted on a complaint made by her father. The case, as set up by the complainant, runs as under:-

Complainant Suresh is having two daughters and three sons. The appellant, his neighbourer, was running a jewellery shop at the relevant time. Complainant alleges that the appellant used to roam around his house to which he objected. The objection, however, did not bring any change in the attitude of the appellant. On 17.7.2006, the complainant had taken his wife to Jind for collecting some medicines. His daughter, the victim, (whose particulars have been with-held from disclosure in view of Section 228-A of IPC) alone was present at the house as the other children of the complainant had gone for their daily work etc. When the complainant and his wife returned around 11.00 A.M., the victim was not found present at home. The complainant searched for his daughter, but he could not find any clue. In view of the known conduct of the appellant, the complainant came to suspect that the appellant had enticed his daughter. He accordingly lodged complaint, Exh.P8, with the police. This set the investigation in motion. The girl was recovered from the appellant on 26.7.2006. She was subjected to medico-legal examination. The victim was produced before Mrs.Seema Singhal, Judicial Magistrate Ist Class and her statement was recorded under Section 164 Cr.P.C. Taking the medical report into consideration, offence under Section 376 IPC was also added. The appellant was arrested and on completion of investigation, challan presented leading to his prosecution and conviction for offences under Sections

363, 366-A and 376 IPC. The appellant was sentenced as under:-

Offence	***Sentence***
363 IPC	To undergo Rigorous imprisonment for a period of 2 (two) years and to pay a fine of Rs.2,000/-, in default of payment of fine to further undergo RI for 2 (two months).
366-A IPC	To undergo Rigorous imprisonment for a period of 3 (three) years and to pay a fine of Rs.3,000/-, in default of payment of fine to further undergo RI for 3 (three months).
376 IPC	To undergo Rigorous imprisonment for a period of 8 (eight) years and to pay a fine of Rs.8,000/-, in default of payment of fine to further undergo RI for 8 (eight months).

The case of the prosecution is sought to be supported on the basis of evidence given by the complainant and to an extent on the medical and other connected evidence. The appellant, when examined under Section 313 Cr.P.C., pleaded that he is innocent beside saying that he was arrested by police on 25.7.2006 and falsely shown as having been arrested on 26.7.2006. He further disclosed that his signatures were obtained on certain blank papers.

According to him, the prosecutrix was in love with him and wanted to marry him. This, according to the appellant, was not to the liking of the parents of the prosecutrix, who were, thus, annoyed with him and wanted to teach him a lesson and that is how he has been falsely implicated in this case.

In view of the stand taken by the appellant, who obviously is seen pleading consent on the part of the victim, the outcome of the case mainly would depend upon the determination about the age of the victim. In order to succeed, the prosecution was obliged to show that the age of prosecutrix is less than 16 years and as such the consent even if pleaded or otherwise proved, would be of no consequence. The offence of rape as defined under Section 375 IPC would stand established even if it be with the consent of prosecutrix, when she is under 16 years of age. Whole stress was in regard to the evidence concerning age of the prosecutrix. The counsel appearing for the appellant had, thus, mainly concentrated in making his submissions before the court on this aspect only. For this, the counsel has mainly relied upon the version given by the victim-prosecutrix and from this he has urged that this is a clear case of consent by a girl, who was having the age of discretion which was certainly beyond 16 years.

Prosecutrix was examined as PW-4 and got recorded her age to be 19-20 years while appearing to give evidence. Her description as recorded by the trial court is as under:-

> “Pinky daughter of Suresh, 19-20 years (by appearance 14-15 years), household, resident of Alewa, District Jind.”

While giving her evidence, she testified that she is two years younger

to her brother Babbal. As per PW-4, she was all alone present in her house on 17.7.2006 as her parents had gone to Jind for taking medicines. She further stated “at about 9 to 10 AM, accused present today in court and he asked me that he would marry me. He brought me to Jind from my house. Then I was taken to Rohtak. I was taken to Delhi and then some other places the names of those places I do not know. I was then ultimately taken to Bombay where for the first time he committed rape on me”. She has also disclosed about the manner in which she was recovered by the police at Julana where they had reached after having visited Banglore and Delhi etc. This, according to the prosecutrix, happened about 8-9 days from the date she was taken from her house by the appellant. When further questioned by the prosecution, PW-4 deposed that the appellant never came to her house prior to 17.7.2006. She otherwise admitted that statement, Exh.P6, was given by her before the Magistrate and this bore her signatures in Hindi. In response to another question, the witness denied having shown the place to the police where the appellant had raped her at Bombay.

At this stage, the Public Prosecutor made a request for cross-examining the witness as she was giving different version than was recorded through her during investigation. The request was allowed. Thus, the main victim, who was subjected to abduction etc. and subsequently raped as alleged was declared hostile. Public Prosecutor then confronted her with earlier version given by her when she conceded that she had mentioned her age to be 14-1/4 years. PW-4 did not stick to the various other portions of a statement purportedly recorded through her. She denied if she had stated that

the appellant used to wander near her house and had a bad eye on her. She also denied if she had stated before the police that the appellant told her that he was having sufficient money and would take her to Delhi, Bombay and other places and that she was not able to understand and so she accompanied him. Significantly she resiled from her earlier version about rape by saying “accused did not take me to “Bani” in the bushes nor I so stated to the police when he committed rape upon me at that place”. She further deposed “I did not state to the police that the accused used to rape me as and when he used to find time”. When questioned about her age, the prosecutrix stated “I cannot say with regard to my exact age, but my parents used to tell me that I am two years younger than my brother Babbal”. Her cross-examination by the defence counsel thereafter followed. PW-4 then stated:-

> “Accused had committed sexual intercourse with me with my consent. My statement Exh.P.7 was not read over to me by police.”

In response to further questioning, the prosecutrix deposed that “my brother Babbal is unmarried. He is about 20-21 years in age now”. Her evidence would bring out in no uncertain terms that she was a consenting party and had willingly accompanied the appellant. This is so clearly discernible from the following version:-

> “Accused came to me at vegetable shop of my father and at his instance I met him near “Khera” which is in the other street of our house and from there we came to Jind on scooter of the accused. We reached Bombay on 19th or 20th July 2006. We remained in travel throughout and

we passed over nights either in the bus or in the train. Many passengers used to be there in the buses and trains. We did not stay in any hotel or Dharamshala. Self stated- we had spent only one night in a park at Bombay."

She did not leave anything to doubt while expressing her love for the appellant in candid and categorical manner and the fact that she was in love with him till the date of giving evidence. Her version is "I was in love with the accused and I am still in love with him. It is wrong to suggest that I have deposed falsely." Thus, it is not difficult to say that this is a case of a clear consent.

That being so, the outcome of the case would mainly hinge on the determination of the age of the prosecutrix. As already noticed, the prosecutrix gave her age to be 19-20 years. The court, however, to my mind, unfairly mentioned her age to be 14-15 years from appearance. It was not proper on the part of court to record her age on its own observation. One may refer to the observations of the Hon'ble Supreme Court in case of ***Raisul v. State of U.P., AIR 1977 Supreme Court 1822*** in this regard. The Hon'ble Supreme Court has categorically held that Courts should not substitute their own estimate in regard to age of accused. In this case, the Sessions Judge on looking at the appellant thought that he was not less than 24 years old and the High Court also on seeing the appellant personally took the view that the estimate of age given by Sessions Judge was correct. The Hon'ble Supreme Court, however, observed that " we do not think that the learned Sessions Judge as well as the High Court were right in substituting their own estimate in regard to the age of the appellant and on the basis of such estimate, rejecting

the statement as to his age made by the appellant. Appearances can often be deceptive.....". Thus, the action of the court in recording the age of the prosecutrix on the basis of appearance cannot be a substitute of evidence that may be available on record in this case.

For finding age of PW-4, another aspect which may call for attention in this regard is that the case was ultimately not decided by the Judge, who recorded the age of PW-4 by estimate. He, thus, had to go by the estimate by another Judge. This would not sound proper at all. The counsel for the appellant would, however, refer to the report, Exh.P1, given by Dr.Dhan Kumar (PW-1), District Medical Officer, General Hospital, Jind. He had conducted the radiological examination of prosecutrix and deposed that her age was 16 to 17 years. While under cross-examination, this witness rather went further to say that the age of prosecutrix, as per report Exh.P1, can even be 19 years. The counsel would then highlight the version of Dr.Renu Aggarwal (PW-3), who had conducted the medico-legal examination of the prosecutrix. While appearing before PW-3, prosecutrix disclosed her age to be 17 year as can be seen from the following:-

> "I medico legally examined.....daughter of Suresh, 17 years (as stated by the patient), female, resident of Alewa, District Jind."

PW-3 had also taken vaginal swabs, which she sealed in a vial and handed over to police. In fact PW-3 had referred the prosecutrix to the radiologist for age determination. As per PW-3, the possibility of sexual intercourse with the prosecutrix could not be ruled. She,

however, further deposed while under cross-examination that there was nothing to suggest that some body had sexual intercourse with victim forcibly and that possibility of her being habitual of having sexual intercourse cannot be ruled out. The learned counsel would also highlight the finding given in Exh.P18, which is the report of Forensic Science Laboratory, Haryana Madhuban, Karnal. The report says that semen could not be detected on exhibit-1 (swabs) and exhibit-2 (underwear). It is on this basis it is pleaded that even intercourse is not fully proved apart from the fact that the prosecutrix was more than 16 years of age and had concededly been a consenting party. The plea, therefore, is that conviction of the appellant cannot be sustained.

Against this, the evidence which was considered by the trial court for holding PW-4 to be less than 16 years is the version of the complainant and other connected evidence, like school leaving certificate showing the prosecutrix to be less than 16 years of age. Version of PW-4 recorded under Section 164 Cr.P.C. by the Magistrate was also pressed before the trial court to say that the prosecutrix was less than 16 years of age. Let us examine these aspects of evidence.

Complainant Suresh (PW-5) while deposing about the age of prosecutrix stated before the court that she is younger to Babbal, then aged 17 years, by 4-5 years. He then gave out the details about the manner in which he found his daughter missing and lodging of a complaint with police and ultimate her recovery after 7-8 days of the occurrence. He (PW-5) was then questioned by defence about the date of his marriage. PW-5 could not categorically deny

that his marriage may be 25 years old. He, however, admitted that his first child was born after a year of his marriage and that second child Babbal was born after 4-5 years of the death of the first child. According to PW-5, there was difference of about 3-4 years in the birth of his every child. If calculated on this basis that the marriage was 25 years old, it would show that first child was born 24 years ago, whereas Babbal could be 19-20 of age. The second child was stated to be 3-4 years younger to Babbal. Babbal's age, from his evidence, would work out to be 19-20 years and if this is taken into consideration, then age of prosecutrix would work out to be `15-16' years, if Babbal's age is taken 19 and `16-17' years if age of Babbal is taken 20 years. In a criminal trial, benefit of doubt is required to be resolved in favour of the defence. This evidence when read in the light of the age given by the doctor after conducting ossification test would tend to show that the age of the prosecutrix reasonably was “16” years or above.

The prosecution has also sought support from the deposition of Ram Kumar, Principal (PW-6), who produced on record the entries in the admission and withdrawal register of the school where the date of birth of the prosecutrix was recorded as 5.5.1992. This is on the basis of admission form filled and signed by one Suman as a guardian of the prosecutrix. PW-6 did not know the relationship of Suman with the prosecutrix. Witness otherwise conceded that at the time of admission, either the birth certificate of the child is required to be given or in the alternative an affidavit in support of the birth is to be furnished by the parents of the child. He did not know on what basis the date of birth of the prosecutrix was

entered at the time of admission of the prosecutrix in the primary school. He did not know the prosecutrix being daughter of Suresh and Roshni Devi of village Alewa personally. In this background, the question would arise as to what value can be attached to this evidence of age given in the school leaving certificate vis-a-vis the medical certificate showing the age to be different then what is reflected in the certificate or admission register. Presumption of authenticity cannot be raised as to the admission form submitted by a person in a school/private school. School leaving certificate may otherwise be a relevant document to be taken into consideration in the absence of any material on record showing any infirmity in such certificate. The requisite authenticity of this school leaving certificate relied upon by the prosecution may seem to be receiving a dent as the entries were not made on the basis of form filled by the parents, but by a stranger, who is not even proved to be related to the prosecutrix in any manner. The medical evidence in regard to the age of the prosecutrix, her own version etc. standing contrary to the same thus would acquire significance in the facts of the present case. Medical certificate and the evidence given by a doctor after conducting the ossification test shows the age of prosecutrix to be between 16-17 years and she could even be 19 years of age. The version given by her father has also been analysed in this regard which would also take her age to be more leaning towards 16-17 years, rather than less than 16 as pleaded by prosecution. The trial court, in my view, did not give sufficient allowance to the infirmity noticed in the school leaving/admission record inasmuch as that entries were not made by the parents of the prosecutrix. Further PW-

6 even was not in a position to say that the entries in the register were made on the basis of a birth certificate or an affidavit. In this background, these entries would not be safe to rely upon for determining the age of the prosecutrix. The counsel representing the appellant would also refer to the evidence of PW-13 SI Mahabir Singh, Investigating Officer to point out the infirmity in the entries in the admission form etc. PW-13 in this regard stated that “it is wrong to suggest that age of prosecutrix was about 19-20 years at the time of registration of the case. Volunteered-she was 16-17 years of age. I had taken in possession copy of the admission form of..... (Blocked) when she was got admitted in the school for the first time. However, the same is not available on the judicial file. I do not know what is admission form. Volunteered- I had taken in possession school leaving certificate which is Ex.P.9.” It is, thus, seen that even as per the Investigating Officer the age of prosecutrix was between 16 to 17 years. She herself has given her age to be more than 16. Medical evidence on the basis of scientific etc. show her to be 16 to 17 years or may be 19 years old. On the face of this evidence, it would not be safe to prefer or rely upon, the sole version of complainant or the entries in the admission form. It is more so when the infirmities are noticed in the entries made in the register. The Principal, who produced the entries in the admission form of the school, was in no position to say that he knew the prosecutrix personally and as such he was only a witness to the documents alone, which he was unable to relate to the prosecutrix. It would be unsafe to say that the prosecution succeeded in showing the age of the prosecutrix to be less than 16. In this regard, the defence has

sufficient material to show which would go to cast doubt on the prosecution evidence concerning age of victim. The prosecutrix otherwise is clearly seen to be a consenting party. The age of prosecutrix cannot be construed to be less than 16 years on the date of alleged occurrence, i.e., July, 2006. The evidence in this regard has remained doubtful, benefit of which must accrue to the defence. The findings recorded by the trial court in convicting the appellant, as such, cannot be sustained.

The appeal is accordingly allowed and the judgment and order of conviction and sentence are set-aside. The appellant is acquitted of the charge levelled against him. His bail bonds and surety bonds stand discharged.

November 14, 2007 (RANJIT SINGH)
ramesh JUDGE